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Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ON PETITIONS AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR PUBLIC INTEREST RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should overrule its long-settled holdings in *Red Lion Broadcasting v. FCC* and *FCC v. National Citizens Committee for Broadcasting* that broadcast regulations receive rational basis review under the First Amendment, that newspaper-broadcast cross-ownership regulations do not impermissibly discriminate in violation of the First or Fifth Amendment, and that newspaper-broadcast cross-ownership regulations are content-neutral.

2. Whether the court of appeals' interpretation of §202(h) of the 1996 Telecommunications Act accords with the decisions of the only other court of appeals to have considered the issue.

3. Whether the court of appeals properly remanded for justification or modification certain aspects of the Federal Communications Commission's 2002 Biennial Regulatory Review Order that were not supported by the record or that lacked reasoned analysis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Public Interest Respondents state as follows:

Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and National Council of the Churches of Christ in the United States have no parent companies or publicly-issued stock.

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STATEMENT

Public Interest Respondents[1] generally adopt the statement of the United States in this case, and write separately to underscore two additional points.

1. The court of appeals upheld much of the FCC's 2002 Biennial Regulatory Review Order ("*2002 Biennial*"). Pet. App. 1a-190a.[2] The court's comprehensive opinion properly notes that the scope of judicial review of federal agency action is "narrow" and that it is only authorized to remand an agency decision when "it is not supported by substantial evidence, or the agency has made a clear error in judgment." *Id.* at 25a (internal citations omitted). For example, the court upheld the FCC's decisions to relax its cross-ownership ban, *id.* at 40a, to retain the "top four" restriction on ownership of local television stations, *id.* at 72a, to revise its definition of local radio markets, *id.* at 85a, and to count "joint sales agreements" toward a radio station's permissible ownership total, *id.* at 96a.

2. The court of appeals was unanimous in its disposition of many key arguments raised by Petitioners and Cross-

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[1] Public Interest Respondents are Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and the National Council of the Churches of Christ in the United States.

[2] References are to the appendix filed by Petitioner in 04-1020.

Petitioners. The court unanimously rejected all of the constitutional challenges raised by Petitioners. *See* Pet. App. 107a. Chief Judge Scirica agreed with the majority on the proper legal standards for review of agency decisions, *compare id.* at 24a-26a, *with id.* at 116a-118a, but came to a different conclusion as to the application of those standards to certain specific rules.

REASONS TO DENY THE WRIT

Review by this Court would be premature. The court of appeals neither forbade nor compelled the implementation of specific rules; it simply remanded those rules that were without factual record support or rational agency explanation. Because many rules challenged by Petitioners are not expected to be retained on remand, review of those rules would likely be unnecessary. Further, all of the rules at issue in this case may be modified or repealed by the FCC during the next congressionally-mandated review of media ownership rules, which the FCC will conduct in 2006. This Court should not expend its scarce judicial resources to pass on specific rules that may be repealed or modified by the time its decision is issued.

More importantly, despite the voluminous record below, the proceeding did not focus on the core issue raised by many Petitioners—whether spectrum scarcity continues to exist. Accordingly, even assuming this Court should wish to revisit this fact-dependent question, this case would be a poor vehicle through which to do so.

Nor does this case present any broad, unsettled issues of law for this Court to review. The court below did not announce any new principle of constitutional law; it simply applied doctrine that has been clearly established by this Court. Petitioners present no valid reason for this Court to overrule this precedent. Further, the Third Circuit's interpretation of the relevant statute's standard of review provision is in com-

plete harmony with the explanation of the only other court of appeals to have considered it.

Stripped of its constitutional and statutory rhetoric, this case is simply about the application of properly articulated administrative law principles to a complex factual record. Such case-specific issues do not warrant this Court's intervention. Sup. Ct. R. 10.

I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT

The appropriate standard of review for assessing the constitutionality of the FCC's broadcast ownership rules was decided by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). The court of appeals properly applied the standards established in *NCCB* to this case. Essentially conceding this point, three Petitioners nonetheless urge this Court to reconsider and overrule *NCCB*.

In *NCCB*, newspaper and broadcast station owners challenged the FCC's then recently adopted newspaper-broadcast cross-ownership rule, which was much more restrictive than the rules at issue in this case. The Court rejected the argument that the cross-ownership rule violated the First Amendment, finding that the argument "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" 436 U.S. at 799 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). The Court observed that the "physical limitations of the broadcast spectrum are well known" and that the number of frequencies used for broadcasting "is far exceeded by the number of persons wishing to broadcast to the public." 436 U.S. at 799.

This Court has repeatedly emphasized that the reconsideration of previous decisions should be approached with the utmost caution. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Indeed, just last term, this Court explicitly relied on *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237 (2003). Because, as shown below, Petitioners present no compelling reason for this Court to reconsider its prior decisions, the Court should deny certiorari.

A. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations

As far back as 1943, this Court rejected a constitutional challenge brought by the broadcast networks against an FCC ownership rule known as the "chain broadcasting rule." The Court recognized that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943). Subsequently, in *Red Lion*, the Court explained that "in view of the limited number of available broadcasting frequencies," it did not violate the First Amendment for the FCC to require broadcasters to serve the public interest by providing certain types of programming. 395 U.S. at 394 (internal quotations omitted).

1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach to Broadcast Regulation

In *FCC v. League of Women Voters of California*, the Court concluded that "[w]e are not prepared . . . to reconsider our longstanding approach [of *Red Lion*] without some signal

from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). This signal has not been given.

a. In this very proceeding, the FCC reaffirmed its support for the scarcity doctrine. Responding to arguments made by two of the present Petitioners, the FCC stated:

> We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits . . . . [T]he courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here. Accordingly, the rational basis test continues to apply to our ownership rules.

Pet. App. 218a (*2002 Biennial* ¶15). As this makes evident, the FCC is clearly not "signaling" this Court to reconsider the scarcity doctrine.

b. Nor has Congress indicated a desire for the Court to reconsider the scarcity doctrine. To the contrary, Congress has enacted numerous laws imposing public interest requirements premised on the continued existence of scarcity, and in some cases, reinforcing that scarcity.

For example, in the Children's Television Act of 1990, Congress explicitly found that as part of television stations' obligations to serve the public interest, stations should provide programming serving the special needs of children. Congress therefore directed the FCC to consider in renewing television licenses the extent to which the licensee has served the educational and informational needs of children. Chil-

dren's Television Act of 1990, Pub. L. No. 101-437, §§ 101(2), 103(a), 104 Stat. 996, *codified in part at* 47 U.S.C. § 303(a). *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and rejecting suggestions of constitutional difficulties with Act).

In 1996, Congress added a new section to the Communications Act to establish a framework for the transition from analog to digital television. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201(a), 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 336 ("1996 Act"). Although this transition offered the opportunity for awarding additional broadcast licenses, Congress opted instead to limit eligibility for digital television licenses to the existing licensees. 47 U.S.C. § 336(a)(1). At the same time, Congress reaffirmed that television licensees were expected to continue to meet their obligation to serve the public interest. *Id.* at § 336(d). Thus, if anything, the 1996 Act actually increased scarcity by declining to make this spectrum available to new licensees.[3]

In 1997, Congress directed that the FCC utilize auctions to award all new commercial broadcast licenses, shifting away from a "comparative hearing" process whereby the FCC evaluated each applicant before awarding a license. Balanced Budget Act, Pub. L. No. 105-33, § 3301, 111 Stat. 251 (1997). This action was intended to address the inefficiencies of the hearing process that stemmed from the growing number of applications for new broadcast licenses. H.R. Rep. No. 105-149 at 558; *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003). In-

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[3] Tribune claims that Congress' requirement that the FCC redistribute spectrum after the digital television transition is complete demonstrates that it no longer believes the spectrum is scarce. 04-1036 Pet. 17. In fact, this leads to the opposite conclusion—if there were not more would-be users than available frequencies, Congress would have no reason to re-apportion the spectrum.

deed, the Balanced Budget Act relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction. H.R. Rep. No. 105-149 at 569-72 (setting minimum amounts "[i]n recognition of the scarcity (and hence, the value) of spectrum"). Both the use of auctions and the high prices they generate[4] demonstrate that there continue to be far more would-be broadcasters than can be accommodated by the broadcast spectrum.

In 2000, Congress actually rolled back an FCC attempt to award additional broadcast licenses through the creation of a new, noncommercial low power FM radio service. A provision in the Department of Commerce and Related Agencies Appropriations Act of 2001 limited the number of low-power radio applications that the FCC could grant, due to concerns that allowing more radio stations on the air would interfere with existing broadcast stations. H.R. 5548 § 632, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

And finally, in early 2004, Congress passed legislation rolling back the FCC's relaxation of the national television audience limits. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004). As part of the *2002 Biennial*, the FCC increased the percentage of the national television audience that one company could "reach" from 35% to 45%. Congress overruled the FCC's decision

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[4] For example, the FCC's first ever open auction of the FM broadcast spectrum saw over 450 bidders participate, and resulted in 110 winning bidders paying nearly $150 million for a portion of the spectrum. News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004). The FCC noted that this auction "signifie[d] the continuing strong demand for radio broadcast spectrum." *Id.* In another example, eleven bidders vied for a single television station license in Blanco, TX; the winning bid approached $19 million. Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000). One reason for the high prices generated by spectrum auctions is that "very few 'new' broadcast licenses are issued these days," a fact that is "the consequence of spectrum scarcity." Manheim & Solum, *supra*, at 441.

and rolled the cap back to 39%. If Congress did not believe that the spectrum was "scarce," it would have no reason to cap permissible ownership. As the D.C. Circuit explained, "[i]n the face of [the limited capacity of the spectrum], the national ownership cap increases the number of different voices heard in the nation . . . . But for the scarcity rationale, that increase would be of no moment." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

2. Spectrum Scarcity Continues To Exist As A Matter Of Fact

Various Petitioners nonetheless argue that this Court should reconsider *NCCB* and *Red Lion* because the factual predicate of the scarcity doctrine has been eroded by the development of cable television, direct broadcast satellites, and the internet. 04-1020 Pet. 10-11, 04-1036 Pet. 16, 04-1045 Pet. 26. But, as the court of appeals correctly recognized, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 47a. Nor is there any conflict among the Circuits on this point. The D.C. Circuit recently rejected the same argument, noting that the "protest that *NCCB* [and the scarcity doctrine] is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002) (internal quotations and citations omitted); *see also American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (noting that the number of frequencies that can be productively used "is far exceeded by the number of persons wishing to broadcast").

Further evidence that there continue to be more would-be broadcasters than frequencies available for licensing is demonstrated by the large number of unlicensed broadcast stations that have been shut down by the FCC in recent

years.[5] Likewise, Media General's contention (04-1020 Pet. 12-13) that the scarcity doctrine has been undermined because this Court has not extended the doctrine to cable or internet regulations misses the point. As the *Red Lion*'s scarcity doctrine is based on the unique physical characteristics of the broadcast spectrum, the fact that the doctrine has not been extended beyond the broadcast arena in no way undercuts its viability in the broadcast arena. Spectrum scarcity exists today in the same form that it did when this Court first recognized the doctrine more than a half-century ago.[6] Further review of this factual question, which was not addressed by the FCC or the court of appeals and barely raised in the huge administrative record, is unwarranted.

3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine

Contrary to many Petitioners' contentions, there is no conflicting authority among the courts of appeals regarding the scarcity doctrine or the appropriate level of scrutiny for broadcast regulations. Every Circuit has recognized that broadcasting regulation is subject to more deferential review

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[5] *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 543, 549-50 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 459 (8th Cir. 2000); *United States v. Dunifer*, 219 F.3d 1004, 1005 (9th Cir. 2000); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam).

[6] Media General claims (04-1020 Pet. 22) that because modern technology has increased the amount of spectrum available for use, scarcity no longer exists. This is not the case. *Red Lion*'s observation that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace," 395 U.S. at 396-97, remains true today with the tremendous growth in cellular telephone service and other wireless services.

under the First Amendment due to the fact that more people wish to broadcast than the spectrum can accommodate.[7]

Tribune contends (04-1036 Pet. 13) that the Third Circuit's suggestion that it would endorse the scarcity doctrine "[e]ven were [it] not constrained by Supreme Court precedent," Pet. App. 47a, somehow creates a conflict with the D.C. Circuit. This is not so. While comments critical of the scarcity doctrine have sometimes appeared in dissenting or concurring opinions of the D.C. Circuit, *see, e.g.*, *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (dissent from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) ("*ACT*") (Edwards, C.J., dissenting); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring), such comments are dicta, and conflicts involving dicta do not merit certiorari. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1754 (2004). Recognizing that *Red Lion* continues to "rule the

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[7] For example, the D.C. Circuit recently reviewed the FCC's system for awarding non-commercial educational broadcast licenses and held that the scheme was subject to deferential review under the First Amendment. It concluded that "[r]egulation of some form is an irreducible feature of any broadcast spectrum worth having, since 'a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.'" *American Family Ass'n*, 365 F.3d at 1169 (quoting *NCCB*, 436 U.S. at 798). *See also Mark v. FCC*, 468 F.2d 266, 269 (1st Cir. 1972); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439-40 (4th Cir 1999); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1039, 1043 (5th Cir. 1982); *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983); *Cmty. Communications Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981); *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

broadcast jungle," *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the D.C. Circuit has consistently and properly applied the scarcity doctrine. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1168; *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("*RTNDA*"); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) ("*TRAC*"). Thus there is simply no conflict for this Court to review.

B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding

Certain Petitioners also challenge the court of appeals' decision that rules barring newspapers from owning broadcast stations do not impermissibly discriminate in violation of the First or Fifth Amendment. As with the scarcity doctrine, this Court has already addressed this issue. In *NCCB*, the Court upheld a ban on newspaper-broadcast cross-ownership against an equal protection challenge, finding the regulations to be a "reasonable means" of promoting the FCC's objectives. 436 U.S. at 801-02. Indeed, even Media General acknowledges (04-1020 Pet. 24) that the *NCCB* Court rejected the argument that the cross-ownership regulations unfairly single out newspaper owners.

1. Nonetheless, Media General and Tribune argue that this Court should reconsider *NCCB* because "in *NCCB's* day, the only other 'major media of mass communications' besides newspapers were broadcast television and radio," while today other forms of mass media such as cable and internet are available. 04-1020 Pet. 24; *see also* 04-1036 Pet. 20. This misreads *NCCB*. The cross-ownership rule at issue in *NCCB* was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate media cross-ownership to promote diversity of viewpoints within local communities. 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broad-*

cast Stations, Second Report & Order, 50 F.C.C.2d 1046, 1075 (1975) ("*1975 Order*")). The FCC excluded certain types of mass media, such as magazines and other periodicals that "dealt exclusively with regional or national issues and ignored local issues." *1975 Order*, 50 F.C.C.2d at 1080 ¶112; *see also NCCB*, 436 U.S. at 787 n.10. Thus, in 1975, the FCC recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues—specifically newspapers, broadcast television, and broadcast radio.

Similarly, in the *2002 Biennial,* the FCC sought to "preserv[e] viewpoint diversity among local, not national, news sources." Pet. App. 484a-485a (*2002 Biennial* ¶399). Thus, the FCC excluded "the large number of *national* news sources such as all-news cable channels and the news sources on the Internet." *Id.* (emphasis added). Finding that "broadcast television, daily newspapers, and broadcast radio" continue to be "the three media platforms that Americans turn to most often for local news and information," *id.* at 520a (*2002 Biennial* ¶452), the FCC appropriately limited the cross-media limits to the media that are the most significant sources of local news.

Petitioners Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC ("NAA") (04-1045 Pet. 27), along with Media General (04-1020 Pet. 25), also claim that the specific cross-ownership regulations adopted in the *2002 Biennial* violate *NCCB*'s equal protection holding because they treat newspaper owners somewhat differently than radio and television station owners. Again, these Petitioners misread *NCCB*. *NCCB* merely required the cross-ownership regulations reviewed below to treat newspaper and broadcast owners "in *essentially* the same fashion." 436 U.S. at 801 (emphasis added). As with the rules at issue in *NCCB*, the cross-ownership regulations treat newspaper and broadcast owners

essentially the same way in that all are restricted in their ability to own another type of local media. *See* Pet. App. 452a. Moreover, contrary to Media General's absolute statement that "a cable company may buy a broadcast station even where a newspaper may not," 04-1020 Pet. 24, a newspaper owner may receive a waiver of the rule to co-own a broadcast station in certain circumstances. Pet. App. 437a (*2002 Biennial* ¶481).

2. The court of appeals' decision not to apply heightened scrutiny to the cross-ownership regulations does not conflict with any decision of this Court. The *NCCB* Court did not apply heightened scrutiny in its disposal of the equal protection challenges, but rather found that content-neutral regulations that prevent any person from owning both a newspaper and a broadcast station are a "*reasonable means* of promoting the public interest in diversified mass communications." 436 U.S. at 802 (emphasis added).

Moreover, *NCCB*'s use of rational basis review is fully consistent with this Court's recent jurisprudence. Tribune and Cross-Petitioner Sinclair Broadcast Group, Inc. ("Sinclair") rely (04-1036 Pet. 21-22, 04-1177 Pet. 15) on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") to argue that *any* regulation that distinguishes between classes of media outlets demands heightened scrutiny. However, this argument is directly precluded by *Turner I*'s admonition that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." 512 U.S. at 660. *Turner I*'s touchstone for determining the level of scrutiny is the type of medium; "heightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (internal citations omitted). As the cross-ownership restrictions apply

to broadcast media, the "special characteristic" of spectrum scarcity makes heightened scrutiny unwarranted.

The other cases relied upon by Tribune (04-1036 Pet. 21-23; *see also* 04-1177 Cross-Pet. 15) are inapposite to the question of the proper standard of review of content-neutral broadcast regulations. *League of Women Voters* applied heightened scrutiny because the statute in question was a *content-based* speech restriction. 468 U.S. at 383.[8] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), considered the constitutionality of a tax imposed only on newspapers, and is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulations, 436 U.S. at 801. Finally, the two court of appeals decisions cited by Tribune (04-1036 Pet. 22-23) concerned regulation of telephone companies, and both cases expressly recognized that broadcast ownership regulations receive a different and lower level of constitutional scrutiny.[9]

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[8] *See also Fox Television Stations*, 280 F.3d at 1046 (rejecting heightened scrutiny because the rule at issue, "unlike the [rule] at issue in *League of Women Voters*, is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*").

[9] Further, both cases were vacated by this Court. *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 191 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam).

C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral

Media General's and Tribune's contention (04-1020 Pet. 26; 04-1036 Pet. 23) that the cross-ownership regulations should have been subjected to heightened scrutiny because they are content-based restrictions on speech likewise provides no basis for reconsidering *NCCB*. As a threshold matter, review of this argument is inappropriate because it was not addressed in the decision below. This Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Certiorari is also unnecessary because this Court has already addressed the question, specifically holding that newspaper-broadcast cross-ownership regulations "are not content related." *NCCB*, 436 U.S. at 801. Lower courts have properly followed that decision, recognizing that cross-ownership rules are simply structural regulations that receive minimal constitutional scrutiny. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1169; *Ruggiero*, 317 F.3d at 244.

In any event, the court of appeals' decision that the structural cross-ownership regulations are not content-based is correct. As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The cross-ownership regulations were not at all motivated by the message of the speaker, but rather were developed to ensure a diversity of media voices was available to the public. Pet. App. 481a-482a (*2002 Biennial* ¶¶393-94). "[B]y placing a value upon diversity the FCC did not necessarily . . . value one speaker, or one type of speech over another; it merely

expressed its intention that there continue to be multiple speakers." *American Family Ass'n,* 365 F.3d at 1169 (internal quotations omitted).

The D.C. Circuit has held that analogous regulations of the structure of cable ownership that were motivated by diversity concerns were not content-based. In *Time Warner Entertainment Co. v. United States*, the court noted that "[a]s the Supreme Court made quite clear in *Turner I*, . . . making way for some speakers" in a context like broadcasting "where that necessarily means limiting the speech of others, is not inherently content-based." 211 F.3d 1313, 1317 (D.C. Cir. 2000). This same, traditional rationale clearly applies to the present regulations—rules restricting broadcast ownership to promote a diversity of media outlets are not subject to heightened First Amendment scrutiny.

D. Should The Court Wish To Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues

The *2002 Biennial* focused on specific ownership rules and not the factual underpinnings of the scarcity doctrine. Any reference to the continued existence of spectrum scarcity was an inconsequential piece of a massive record, and the factual basis for doctrine was not addressed on the merits by the FCC or the court of appeals. Re-examination of the scarcity doctrine would be a fact-intensive process. The present case plainly does not afford this Court a sufficient record or factual basis for such a task.

Moreover, as a practical matter, this case does not present an actual cross-ownership rule for constitutional review. Because the court below agreed with the FCC that the original newspaper-broadcast cross-ownership rule was no longer necessary, *see* Pet. App. 40a, there is no need to re-evaluate the constitutionality of that rule. On the other hand, since the court found that the replacement rule adopted by the FCC

was arbitrary and capricious and subject to further proceedings on remand, it would make no sense to evaluate the constitutionality of that rule at this time.

Further, the FCC has before it at least three licensing cases that squarely present the issue of whether the cross-ownership prohibition is constitutional. Specifically, Media General has filed license renewal applications asking the FCC to waive the newspaper-broadcast cross-ownership rule to allow it to continue to own both a daily newspaper and a television station in the Myrtle Beach-Florence, South Carolina, Panama City, Florida, and Columbus, Georgia DMAs.[10] In making its waiver requests, Media General argues that spectrum scarcity no longer exists and thus the cross-ownership rules are unconstitutional. *See, e.g.* Application for Renewal of Broadcast Station License for WBTW, Media General Opposition to Petition to Deny 39-44 (Dec. 14, 2004). Because these cases present the issue in specific, concrete factual settings, yet do not raise the wide variety of issues presented in the *2002 Biennial*, any one would present a better vehicle for revisiting the constitutional issues raised by Petitioners in this case, should this Court be inclined to do so.

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT

Petitioner National Association of Broadcasters ("NAB"), along with Tribune, NAA, and Respondent Clear Channel Communications, Inc. ("Clear Channel")[11] assert there is a

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[10] Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004), Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004), Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004).

[11] Clear Channel is a Respondent in 04-1033.

circuit split with respect to the FCC's construction of §202(h) of the 1996 Act. This is not so. All three members of the panel agreed that the court of appeals' construction is consistent with that of the D.C. Circuit. Their ruling that the periodic review mandated by §202(h) should employ the normal arbitrary and capricious test generally required by the Administrative Procedure Act is clearly correct and should not be disturbed. Nor is there reason for this Court to examine the court of appeals' unanimous conclusion that §202(h) allows the FCC to adopt stronger rules at the conclusion of the review process.

Although each of the petitioners emphasize the deregulatory thrust of the 1996 Act, there is no suggestion that the ruling below conflicts with any other circuit on this point. *See* Pet. App. 34a (majority noting that 1996 Act is deregulatory); Pet. App 122a (concurring judge noting the "deregulatory flavor" of the 1996 Act). Nor do any of the Petitioners point to express language in any statute that prohibits the FCC from increasing its regulatory oversight when the record justifies such action. Under this Court's jurisprudence, the FCC is entitled to deference in construction of statutory ambiguities such as this, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and the petitions surely do not raise an issue here that would support issuance of a writ of certiorari.

1. Tribune, NAA, Sinclair, and Clear Channel argue that the Third Circuit's holding that §202(h) does not impose a more exacting standard of review is in conflict with that of the D.C. Circuit. *See* 04-1036 Pet. 24-26; 04-1045 Pet. 19-23; 04-1177 Cross-Pet. 11-12; Clear Channel Br. 24-27. These arguments mischaracterize the sequence in which the FCC and the D.C. Circuit acted and downplay the D.C. Circuit's definitive decision in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). As the Third Circuit joined *Cellco*

in holding that the phrase "necessary in the public interest" [12] did not create a deregulatory presumption, and "endorsing the [FCC]'s view that 'necessary' must mean the same thing in the periodic review context as in the rulemaking context," Pet. App. 31a, there is no conflict.[13]

Clear Channel's quotations of fragments from *Cellco* are misleadingly incomplete, as can be seen by reference to the complete passages from which Clear Channel quotes. For example, Clear Channel claims that *Cellco*, "expressly extended to Section 11 the 'presumption in favor of repealing or modifying covered rules' that the D.C. Circuit had found inherent in Section 202(h)." Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 97). What *Cellco* actually said was that "the [FCC] agreed that *where §11's conditions are met*, §11 creates a presumption in favor of repealing or modifying" the

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[12] The provision directly at issue in *Cellco* was §11 of the 1996 Act, a biennial review provision that, just like §202(h), requires the FCC to repeal or modify regulations no longer "necessary in the public interest."

[13] Petitioners rely on the D.C. Circuit's pre-*Cellco* decisions in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"), and *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). However, the D.C. Circuit later modified the *Fox I* decision to "leave unresolved precisely what §202(h) means." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002) ("*Fox II*"). Moreover, *Cellco* explicitly discussed and harmonized its ruling with those in *Fox I*, *Fox II* and *Sinclair*. 357 F.3d at 97-98. The *Cellco* panel pointed out that "shortly after *Sinclair* was decided, the court in [*Fox II*] retracted *Fox I*'s definition of 'necessary'" and that "the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations." 357 F.3d at 98. Thus, for example, when NAB refers (04-1033 Pet. 22, *see also* 04-1036 Pet. 24, 04-1045 Pet. 19) to *Fox I* and *Sinclair* as imposing "a presumption in favor of repealing or modifying the ownership rules," it ignores the subsequent *Cellco*, ruling, which specifically stated that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that §11 embodies a presumption in favor of deregulation." 357 F.3d at 98. Importantly, the *2002 Biennial*, which purports to rely on *Fox I* and *Sinclair*, Pet. App. 215a (*2002 Biennial* ¶11), was issued prior to the *Cellco* decision.

rules. 357 F.3d at 97 (emphasis added). Indeed, there is no dispute within or among the circuits that when a regulation is found no longer to be in the public interest that there is a presumption in favor of repeal or modification. *See id.* at 99. Similarly, although Clear Channel claims that *Cellco* imposes obligations that go "beyond [the FCC's] normal monitoring responsibilities," Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 99), the decision's preceding sentence makes clear that the *Cellco* court was referring to remedies, not the threshold test. 357 F.3d at 99 ("The [FCC] reasonably concluded that the deregulatory presumption arises only after it has determined under §11(a) that a regulation is no longer necessary in the public interest.").

2. NAB, supported by Clear Channel, presents a second statutory argument, claiming that the deregulatory goals of the 1996 Act permit the FCC only to deregulate and precludes it from ever tightening its radio ownership regulations at the conclusion of a biennial review. 04-1033 Pet. 19-26; Clear Channel Br. 20-24. There is no suggestion of a circuit conflict on this point, and no specific statutory provision governs this question. This, then, is also an issue as to which the FCC is entitled to substantial deference. *See, e.g.,. Mead,* 533 U.S. at 229.

NAB argues (04-1033 Pet. 22) that "Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened," but none of the language it cites from the statute or the D.C. Circuit's *Fox* and *Sinclair* decisions addresses the particular issue presented here. To say that "Congress set in motion a process to deregulate the structure of the broadcast and cable industries," 04-1033 Pet. 22 (quoting *Fox I*, 280 F.3d at 1033), is not inconsistent with an agency determination that the deregulatory process can be accomplished with one step backward and three steps forward.

Both NAB and Clear Channel likewise maintain that the phrase "repeal or modify" must be read so that "modify" means only "that the [FCC] can relax existing restrictions; it does not authorize the [FCC] to tighten them." 04-1033 Pet. 23; *see also* Clear Channel Br. 20, and that the court of appeals ruling "conflicts with the text and structure of Section 202 as a whole." Clear Channel Br. 21. There is no basis to disturb the court of appeals' holding on this point. As the panel majority reasonably explained, the deregulatory goal of §202(h) is fulfilled by "requir[ing] the [FCC] periodically to justify its existing regulations, an obligation it would not otherwise have." Pet. App. 34a. *See also id.* at 124a ("Despite §202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the [FCC] finds such action in the public interest.") (Scirica, C.J., concurring in part and dissenting in part). There is nothing important or novel about this garden variety question of statutory construction, or the resolution of it below, much less anything which would rise to the level of significance to merit this Court's attention.

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION

1. Both NAA and the Government's Conditional Cross-Petition contend (04-1045 Pet. 23-25; 04-1168 Cross-Pet. 21-28) that the court of appeals did not afford sufficient deference to the FCC's decisionmaking.[14] Yet neither claims that

[14] The deference claim is not raised by other industry Petitioners. Like Public Interest Respondents, many industry Petitioners argued to the court below that certain FCC decisions were arbitrary and capricious. *See* Pet. App. 52a (industry petitioners argued exclusion of cable but inclusion of internet in diversity index arbitrary and capricious); 58a (industry petitioners argued "equal market shares" assumption arbitrary and capricious); 103a (industry petitioners argued specific local radio limits arbitrary and capricious).

the court failed to articulate the correct deference standards. *See* 04-1045 Pet. 24; 04-1168 Cross-Pet. 23, 27. Indeed, the court below correctly noted that its scope of review was narrow, Pet. App. 25a, that it was not to substitute its judgment for that of the agency, *id.*, and that "[d]eference to the [FCC]'s judgment is highest when assessing the rationality of the agency's line-drawing endeavors," *id.* at 62a. The court remanded only when the agency's decision was "not supported by substantial evidence." *Id.* at 25a. Importantly, there was no disagreement between the majority and Chief Judge Scirica about the proper legal standards, *compare id.* at 24a-26a, *with id.* at 116a-118a; the only disagreement was over the application of those standards to specific rules at issue. At bottom, NAA and the Government simply quarrel over this application of law to fact. That issue does not merit review. Sup. Ct. R. 10.

2. Notwithstanding the fact that this issue does not warrant intervention by this Court, the court of appeals' decision to remand certain rules was correct. The Government claims (04-1168 Cross-Pet. 21) that the court of appeals should have deferred to the FCC's decision to assume equal market shares for outlets within the same media. The flaw in this argument, as the court observed, is that this equal market share assumption conflicted with other parts of the *2002 Biennial*, where the FCC expressly found that there was "no reason to believe that all media are of equal importance." Pet. App. 59a (quoting *2002 Biennial* ¶409). The court correctly pointed out that "the assignment of equal market shares generates absurd results," such as the Dutchess Community College television station receiving a market share *equal to* New York City's ABC affiliate and *higher than* the *New York Times*. Pet. App. 59a. In sum, the court found that "assuming equal market shares [is] unrealistic and inconsistent with the [FCC]'s overall approach . . . and proffered rationale," and thus it properly remanded that decision. *Id.* at 61a.

The Government also questions (04-1168 Cross-Pet. 24) the deference given to the FCC's decision to give substantial weight to the internet in the FCC's Diversity Index. Once again, however, the court appropriately remanded in light of the FCC's failure to explain obvious inconsistencies. The court correctly noted that the FCC's rationale for excluding cable television from the Diversity Index also necessarily applied to the internet. *See* Pet. App. 52a-58a. For example, while the FCC discounted cable where a survey suggesting that cable was a source of local news conflicted with other record evidence, the FCC failed to discount the internet under analogous circumstances. *Id.* at 55a.[15] Because the similarities between cable television and the internet required consistent treatment, the court properly found that the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was irrational." *Id.* at 52a.

Finally, the Government challenges (04-1168 Cross-Pet. 27-28) the court of appeals' review of specific limits chosen regarding cross-media and local radio station ownership. But in fact the court *upheld* many of the FCC's line-drawing decisions, *see id.* at 75a (upholding "top-four restriction" on local TV ownership), 85a (upholding local radio market definition), only remanding those that were marred by inconsistencies. For example, the specific limits created by the FCC, purportedly developed to prevent "problematic levels of concentration," *id.* at 509a (*2002 Biennial* ¶435), would have allowed certain media combinations resulting in considerably higher concentration levels than others that were prohibited. The court correctly held that "[t]he [FCC]'s failure to provide any explanation for this glaring inconsistency is without a

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[15] Further, the court noted that the FCC's attempt to justify the differential treatment by arguing that local cable news is not available to everyone while the internet is was inconsistent with the FCC's recognition (elsewhere in the *2002 Biennial*) that nearly one-third of Americans have no internet access. Pet. App. at 57a-58a.

doubt arbitrary and capricious." *Id.* at 63a. Thus, while the court properly engaged in highly deferential review of specific limits chosen by the FCC, it did not abdicate its responsibility to remand when the lines drawn were not supported by the record and therefore "patently unreasonable." *Sinclair*, 284 F.3d at 162.[16]

It is a truism that this Court is "'[a] court of law . . . rather than a court for correction of errors in fact finding.'" *Missouri v. Jenkins*, 515 U.S. 70, 162 (1995) (Souter, J., dissenting) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). As the decision below rests upon a correct understanding of this Court's principles of administrative deference, Petitioners' contention is simply that the court of appeals misapplied the law to the facts of this case. As explained above, that case-specific issue does not merit this Court's attention.

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[16] The Government also challenges (04-1168 Pet. 27-28) the remand of the FCC's specific local radio ownership limits. Once again, the court of appeals remanded these limits because of the irrational and inconsistent manner in which they were developed. For example, the court pointed out that the FCC failed to explain why it ignored the DOJ/FTC Merger Guidelines in developing the local radio limits, but expressly relied on the Guidelines in developing analogous local television ownership limits. Pet. App 103a. Further, while the rationale for the local radio ownership limits depended heavily on the theory that a certain number of equal-sized competitors would make a market competitive, the court correctly noted that "record evidence supports neither actual nor potential existence of equal-sized competitors" in the local radio market. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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